Mr Justice Grier

Supreme Court,

OF THE UNITED STATES,

DECEMBER TERM, 1868.

No. 89.

FREDERIC BRONSON, EXECUTOR, OF THE LAST WILL AND TESTAMENT OF ARTHUR BRONSON, DECEASED,

Plaintiff in Error,

vs.

PETER RODES.

IN ERROR TO THE COURT OF APPEALS,

OF THE STATE OF NEW YORK.

BRIEF ON RE-ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN J. TOWNSEND,

Of Counsel.

New York:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. LIBERTY.
1868.

Motion Day: Dec 9 1868

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

No. 89 of December Term, 1863.

Frederic Bronson, Executor of the Last Will and Testament of Arthur Bronson, deceased,
Plaintiff in Error,
vs.
Peter Rodes.

Brief for the Plaintiff in Error on Re-argument.

WHERE RIGHTS ARE INFRINGED, WHERE FUNDAMENTAL PRINCIPLES ARE OVERTHROWN, WHERE THE GENERAL SYSTEM OF THE LAWS IS DEPARTED FROM, THE LEGISLATIVE INTENTION MUST BE EXPRESSED WITH IRRESISTIBLE CLEARNESS TO INDUCE A COURT OF JUSTICE TO SUPPOSE A DESIGN TO EFFECT SUCH OBJECTS.

United States vs. Fisher, 2 Cranch, 358, 390.

A.

The remarks immediately following are intended to present in a clearer light that the Acts of Congress show that the Legislature did not declare notes and coin equivalent.

As legal-tender notes are not intrinsically equivalent to coin, and could not be under the conditions which exist, it is impossible to infer from the tenor of the Legal-tender act that Congress intended to declare them to be equivalent. The idea could have been expressed, and had it been present it would have been expressed unequivocally. Such a declaration would be ineffectual and illusory, yet capable of being stated, and that in terms clear and unambigous.

See the legal-tender act of New Jersey, passed December 7, 1763 hereafter cited.

Also the legal-tender act of Pennsylvania, passed in 1777, ch. 3.

Also the legal-tender act of Virginia, passed in 1776. Henings State at Large Vol. 9, p. 147.

A declaration to the contrary effect is reiterated upon the statute book. The Government has never failed, both in its legislation and in its practice, to point out to people and call their attention to the fact that the notes and coin are not equivalent.

"The very clause which makes the Treasury notes a legal tender, recognizes the distinction. 'Shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, and interest on Government bonds which *shall be paid in coin.*' "—(12 Stat- at Large, 348, Section 1.)

That they were not equivalent to coin, the following provision in the same section is significant: "And such United States notes shall be received *the same as coin at their par value* in payment for any loans that may be hereafter sold or negotiated by the Secretary of the Treasury."

"By the Act of March 17, 1862, the Secretary of the Treasury is authorized to *purchase coin* with any of the

bonds or notes of the United States, authorized by law, *at such rates and upon such terms* as he may deem most advantageous to the public interest." (12 Stat. at Large, 345.)

The Act of July 11, 1862 (12 Stat. at Large, 532), authorized the further issue of legal tender notes, but this issue, unlike the first, instead of being convertible into bonds "at their par value," is convertible as follows: "And the Secretary of the Treasury may exchange for such notes *on such terms as he shall think most beneficial to the public interest*, any bonds of the United States, &c., redeemable after five and payable in twenty years."

The language quoted refers unmistakably to legal tender notes as a currency unstable and unequal in value to coin.

The Act of March 3, 1863, 12 Stat. at Large, 710, authorized the Secretary of the Treasury to borrow $900,000,000 on ten-forty bonds, so called, payable *in coin*, bearing interest payable *in coin*, and to dispose of these bonds at any time *upon such terms as he may deem most advisable, for lawful money of the United States.*

By the second section of the same act he was authorized to issue Treasury notes; and it was provided that "the interest on the said Treasury notes, and on certificates of indebtedness and deposit *hereafter issued*, shall be paid in *lawful money*."

"And the said Treasury notes may be made a legal tender to the same extent as United States notes *for their face value, excluding interest.*

The act of March 3, 1864, (13 Stat. at Large, 13,) authorized the Secretary of the Treasury to borrow $200,000,000 (in lieu of so much of the last mentioned loan) on five-forty bonds, payable *in coin*, bearing interest *in coin*, and to dispose of them on such terms as he may

deem most advisable for *lawful money* of the United States.

On the 17th of June, 1864, Congress passed a law declaring that it should thereafter "be unlawful to make any loan of money not in coin, to be repaid in coin, or to make any loan of coin to be repaid in money, or currency other than coin." (13 Stat. at Large, p. 132.)

The act of June 30, 1864, (13 Stat. at Large, p. 218,) authorized the Secretary of the Treasury to borrow $400,000,000, and to issue therefor bonds, payable at any period not more than forty years from date, bearing an annual interest not exceeding six per centum, payable semi-annually *in coin*, and to dispose of them on such terms as he may deem most advisable for *lawful money* of the United States, or at his discretion for Treasury notes, certificates of indebtedness, &c., issued under any act of Congress.

The second section authorizes the Secretary of the Treasury to issue $200,000,000 in Treasury notes, payable at any time not exceeding three years from date, bearing interest, payable in *lawful money* at maturity, and to dispose of them "on the best terms that can be obtained for lawful money," and provided further, that they "shall be a legal tender to the same extent as United States notes, *for their face value*, excluding interest, and may be paid to any creditor of the United States at their *face value*, excluding interest, or to any creditor willing to receive them at par, including interest."

The act of Jan. 18, 1865, (13 Stat. at Large, 425,) authorizes the issue of Treasury notes (Seven-thirties) in lieu of bonds authorized by the last mentioned act, and the disposal of them for *lawful money*, &c.

The act of March 3, 1865, (13 Stat. at Large, 468,) authorized the issue of $600,000,000 in Five-forty bonds or Treasury notes, "and the principal or interest, or both, may be made payable *in coin or other lawful money;* provided that the rate of interest on any such bonds or Treasury notes, *when payable in coin*, shall not exceed six per centum per annum; and when not payable in

coin shall not exceed seven and three-tenths per centum per annum."

The second section of the act authorized the disposal of them for coin or other lawful money of the United States, or for any Trersury notes, &c., or other representatives of value which have been or may be issued under any act of Congress.

The third and fourth sections of the act of March 10, 1866, provided that all persons making certain internal revenue returns shall declare whether the several rates and amounts therein contained are stated according to their values in legal-tender currency, and that whenever the rates and amounts shall be stated in coined money, "it shall be the duty of each Assessor receiving the same to reduce such rates and amounts to their equivalent in legal-tender currency, according to the value of such coined money in such currency at the time when and place where said lists or returns are receivable, and *which value the said assessor shall determine.*" (14 Stat. at Large, 5.) *Ibid.*, p. 147.

The twelfth section of tne act of March 3, 1865, provides that in all proceedings in any Court for the recovery of duties upon imports, the judgment "shall be payable in the coin by law receivable for duties," and the execution shall require the Marshall to satisfy the same in coin, and in case of a levy and sale "the Marshall shall refuse payment from any purchaser at such sale in any other money than that specified in the execution." (13 stat. at Large, 494.)

The argument founded upon the *practice* of the government, Mr. Seldens brief p. p. 9. 10, is here referred to.

B.

The remarks immediately following are intended to present in a clearer light the argument that the act of February 25th, 1862, does not affect coin contracts or

impair the right freely to select any existing currency as a medium of payment.

The act simply declares the notes to be lawful money and a legal tender.

Obviously the selection of coin as a medium of payment, does not impair the efficiency of notes as a tender.

A glancer at earlier legislation in America, reveals the difference between the act of 1862, and the precedent acts which not only assumed to declare the extrinsic or nominal value of the notes emitted, but under severe penalities prohibited all dealings in coin.

In America, public sentiment was appealed to, to impose upon all who should presume to select coin as a medum of payment, a penalty the most severe—the loss credit.

In England, from a very early period, whenever, from time to time, the currency of base coin became an intolerable nuisance, statutes were passed forbidding, after the base coin had been publicly decried, the future use of it under penalties; but only in a single instance was the pure coin of the realm decried, and then only in Ireland, with the intent of forcing upon that miserable kingdom a base coin which was esteemed unfit for use in England and which was coined at the time expressly for use in Ireland.

1763, Dec. 7. New Jersey, by statute, authorised the issue of £10,000 in bills of credit, and declared them to be a legal tender for any debt or contract, either for *Sterling money, silver money of America, dollars, or any other species of gold or silver, or any other quantity of plate or gold* as effectual in the law as if the species contracted for, or the current coin passing in the colony

had been offered and tendered for the same. The penalty for refusal was total loss of the debt and prohibition of any suit thereon. A penalty of £25 for each offense was imposed for demanding a higher price in bills for merchandize than would be accepted in coin.

1776, Jan. 11. Congress resolved that any person refusing the Continental bills of credit, or obstructing or discouraging their circulation should be treated as an enemy of his country.

2 Jour. of Congress, 21.

1777, Jan. 14. Congress, after reciting that Continental money ought to be supported at the full value, expressed in the respective bills, by the inhabitants of those States for whose benefit they were issued, and who stand bound to redeem the same according to the like value, and the pernicious artifices of the enemies of American liberty to impair the credit of the said bills, *by raising the nominal value of gold and silver*, or any species of money whatever, ought to be guarded against and prevented—resolved that all such bills of credit ought to pass current in all payments, trade and dealings, and be deemed in value equal to the nominal value of Spanish milled dollars, and that whoever shall offer, ask or receive more in the said bills for any gold or silver coin, bullion, or any other species of money whatever, than the nominal sum or account thereof in Spanish milled dollars, or more in bills for any lands, houses, goods or commodities whatsoever, than the same could be purchased at of the same person in gold or silver—or shall offer to sell any goods or commodities for gold or silver coin, or any other species of money, and refuse to sell the same for Continental bills, every such person ought to be deemed an *enemy to the liberties of the United States*, and to forfeit the value of the money so exchanged, or the house, land or commodity so sold, or offered for sale, and recommended to the Legislatures of the respective States to enact laws inflicting such forfeit-

ures and other penalties on offenders as will prevent such pernicious practices. Congress further recommended to the States to pass laws making the Continental bills a legal tender in payment of public and private debts, and a refusal thereof an extinguishment of the debt—that debts *payable in sterling money* be discharged with Continental dollars, at the rate of four shillings sixpence sterling per dollar—and that in discharge of all debts and contracts Continental dollars pass at the rate fixed by the respective States, for the value of Spanish milled dollars.

1777 ch. 3. Pennsylvania passed an act entitled "An act for making the continental bills of credit and the bills of credit emitted by resolves of the late assembly a legal tender, and for other purposes."

The first section recites that it is highly necessary that both kinds of bills be made a legal tender in all payments, and be alike taken by every person in the discharge of debts, and for the purchase of the necessaries of life.

The second section provides that after the 6th February, 1777, they shall pass current, and be received in payment of all debts, according to the sum which they respectively entitle the bearer to receive—each dollar thereon expressed to be taken and estimated at the rate or value of seven shillings and six pence, and of equal value in the payment of such debts with a Spanish milled silver dollar, weighing seventeen penny weights and six grains, *any clause, proviso or device in any bond, note or instrument of writivg to the contrary thereof, in any wise notwithstanding.*

The third section provides that if any person should refuse to receive any of the said bills when properly tendered, he shall be for ever barred from any suit therefor.

By the fourth section the creditor might within four

days demand payment before two credible witnesses, and be entitled to receive his principal without interest from the date of the tender.

But if not demanded within four days the fifth section imposes a forfeiture of the debt—one-third part to the debtor, two-thirds to the State.

The sixth section recites—that divers persons (taking advantage of the necessitous) when they put money on loan or in other contracts, have bargained with and forced the borrower or purchaser to pay the debt in sterling money accounted as the exchange might be between Philadelphia and London, and enacts, that where any person stands bound to pay in sterling money, the creditor shall receive bills of credit in payment at the rate of one hundred and fifty-five pounds Pennsylvania currency, for one hundred pounds sterling, or in case of refusal shall be subject as aforesaid.

The seventh section after reciting that bonds or other writings may have been given for money to be paid in half Johanesses, weighing nine pennyweights, or as much in bills of credit as will purchase the same, enacts that eight Continental dollars shall be deemed and taken to be worth one gold Portuguese piece of eight; or in the same proportion for all other gold coin—persons refusing shall be subject as aforesaid.

By the ninth section every debtor is required to inform against offenders under penalty of two shillings in the pound.

By the twelfth section a penalty is imposed for assigning a debt after tender.

The thirteenth section provides that if any person shall refuse to receive bills of credit in payment for a commodity which he shall offer for sale, or offer the same for a less price to be paid in gold or silver, shall forfeit to the State a sum of money equal to the sum he has asked for the commodity; and upon proof being made by two credible witnesses before a justice of the peace such justice shall issue his precept, &c.

1777, May, Virginia passed an Act with a similar

preamble as is expressed in the resolution of Congress, which provided that the bills should pass current in all payments, and be deemed equal to the same nominal sum in Spanish milled dollars; that whoever shall offer, or ask or receive more in said bills for coin, or any other species of money than the nominal sum or amount thereof, or more in bills for lands, goods or commodities than the same could be purchased at of the same person in coin, or shall offer to sell goods for coin, and refuse to sell the same for bills, shall forfeit the value.

The act further provides for an extinguishment of interest after tender, and that debts payable in sterling shall be dicharged at 33⅓ per cent exchange, and the bills shall pass at the rate of six shillings currency per dollar.

The act provides for the case of persons who to avoid the force of a tender shall put their specialties in the hands of persons not authorized to receive the money due therein.

9 Hen. St., at Large 297.

May, 1776, in Virginia, a bill was passed providing among otber things that if any person shall exchange coin for notes and demand or take any allowance for the difference in value or shall sell bills of exchange at a higher difference of exchange for notes than for gold he shall forfeit twenty-five per cent.

9 Hen. St., at Large 147.

The following reported cases contain references to provincial and colonial legal tender acts.

Shollenberger *vs.* Brinton, 52 Penn. R. 71.
4 Peters, 432. 434.
11 Peters, 268, 312.

"The Assembly of Pennsylvania, 25th of March, 1780, issued one hundred thousand dollars in paper bills, founded on the faith of the State, some city lots and the Province Isand which at that time belonged to the State

(hence this emission was called Island money); they also issued the bills on interest at 5 per cent per annum."

"These bills thus propped up, were ushered into the world with great confidence of the Assembly. They however passed in a depreciated state, much below their nominal value, to remedy which, a subsequent act was passed, December 23d, 1780, by which these bills were made, a legal tender, with penalities for refusing to take them for goods, &c., viz.: forfeiture of double the value offered. And for the second offence, of half the offenders lands, goods and chattels, and imprisonment of his person during the war."

From a note to Pelatiah Webster's essay, published May, 1781.

The following note is appended to a pamphlet entitled "Strictures on Tender Acts," first published in Philadelphia, Dec. 13, 1780; by Pelatiah Webster, A. M.

"The fatal error, that the credit and currency of the continental money could be kept up and supported by acts of compulsion entered so deep into the mind of Congress and of all departments of administration through the States, that no considerations of justice, religion or policy or even experience of its utter inefficacy could eradicate it; it seemed to be a kind of obstinate delirium totally deaf to every argument drawn from justice and right, from its natural tendency and mischief, from common sense and even common safety."

Congress began as early as Jan. 11, 1776, to hold up and recommend this maxim of maniasm, when continental money was but five months old (for its actual circulation commenced the beginning of August, 1775, though the bills were dated May 10, preceding, that being the first day of that session of Congress). Congress then resolved that "whoever should refuse to receive in payment continental bills, &c, should be deemed and treated as an enemy of his country, and be precluded from all trade and intercourse with the inhabitants,"

common exchange, nor take no profit for making such exchange upon pain of forfeiture.

(2 H. 4.—Merchants who sell their merchandise, and the one half of the money of England do employ in other merchandise of the realm, may freely carry out of the realm the other half.)

The foregoing citations shew that currencies of unequal value free co-exist, and may be freely selected until prohibited by legislation.

In those instances the currency prohibited was base—in the following notable example, taken from Irish history, the currency prohibited was sterling.

THE CASE OF MIXED MONEY.

In the matter of money, Ireland had always been abused. The debased coin in England was bad—in Ireland worse.

In England, in 1560, there were four sorts of testers, or six-pences—debased groats and rose-pence. "The "working man was robbed without knowing how or why, "while the tradesman and farmers, knowing that a six-"pence was not a six pence, defied the feeble laws which "attempted to regulate the price of produce."

In the discussion which preceded the purification of the coin by which Elizabeth signalized the beginning of her reign, Sir Thomas Stanley's plan was in substance that the testers better and worse might be called down from six to four pence—a period might be fixed at which they would be brought in at that price. The £1,200,000 would be bought for £800,000. The bullion when re-coined would produce £837,500, leaving a profit of £37,500 to cover expenses. "If the Queen wished to "make a better thing of it, the *worst money might be* "*sent to Ireland*, as the general dirt heap for the out-"casting of England's vileness."

7 Froude, 415, 458.

A. D., 1550. "The Irish standard had been always "lower than the English when the English silver was "eleven ounces fine to one of alloy, the Irish had been "eight ounces fine to four of alloy."

""An indenture was drawn on the 9th of August be- "tween the councel and Martin Perry, granting to him "the management of the mint establishment on these "terms; the money to be made was to be *four ounces "fine with eight of alloy.*"

This was for use in Ireland.

A. D. 1551. "The countrymen so suspected the "money that they would not take it on upon any terms— "the workmen demanded to be paid in silver, not in "silvered brass."

A. D. 1552. "A cow that had been worth six shillings sold for forty shillings. These who before had bought little at high prices, could now buy nothing at any price, and fever followed in the rear of famine."

"The actual cause of their misery they did not know, "and no marvel when the wisest were blinded—but they "understood that it came from England, and from Eng- "lish rule."

5 Froude, 423, 424, 430, 435.

A. D. 1550. The turbulent Shan O'Neil, Earl of Tyrone, when urged to visit England, wrote to Elizabeth:

"Please your majesty, your majesty's money here is "not so good as your money in England, and will not "pass current there. Please your majesty to send me "£3,000 English money to pay my expenses in going "over to you, and when I come back I will pay your "deputy £3,000 Irish, such as you are pleased to have "current here." 8 Froude, p. 18.

In the war which followed, Elizabeth's patience and her exchequer were alike exhausted.

A. D. 1567. What the Low Countries were to Spain Ireland was to England, a dependent province, occupied by a population alien in blood, in creed, in temperament.

A. D. 1568. "Money, as usual, and especially money "for Ireland, was a subject on which not one of her "ministers approached Elizabeth without fear."

The duty was thrust upon Cecil, who, writing to Sidney, says: "In all these things I only am forced to "break the ice—and if I might be answered comfort- "ably, as reason requireth, my pains were tolerable, but truly, my Lord, as it is used, I cannot further ~~answer~~ endure it."

A. D. 1570. "The cost of the Irish Government, from "the date of Elizabeth's accession, had been £90,000 — "and of this £70,000 remained unpaid—remained in the "form of outstanding debts to the farmers and con- "tractors, who supplied the army, and of exchequer "bills bearing usurious interest. Elizabeth hated spend- "ing money."

"If England throve Ireland bled for it."

"It cannot be said that England deserved to keep a "country which it mismanaged so disastrously. The "Irish were not to be blamed if they looked to the "Pope—to Spain, to France, to any friend in earth or "heaven to deliver them from a power which discharged "no single duty that rulers owe to subjects."

"Had parliament filled her lap with gold, little of it "could have been spared for Ireland, and this poor "country drifted on before the stream of age, from "misery to misery."

10 Froude, 484, 514, 517, 536.

In April, in the 43d year of her reign, when the pure

coin of England was current in Ireland, one Brett, of Drogheda, bonght wares of one Gilbert, in London, and became bound for the payment of £100 sterling current, and lawful money of England, at the tomb of Earl Strongbow—Christ Church, Dublin.

Before the debt matured, Elizabeth, in order to pay the royal army, which was maintained in the kingdom, for several years to suppress the rebellion of Tyrone, caused a *great quantity* of *mixed money*, with the usual stamp of the arms of England, and insignia of her royal title to be coined *in the tower of London*, and transmitted this money to Ireland, with a proclamation by which her majesty declared, and established this mixed money immediately after the said proclamation, to be THE LAWFUL AND CURRENT MONEY of the kiugdom, and expressly commanded that it should be so used, accepted and reputed by all her subjects, and others using any commerce *in that kingdom;* and that if any person should refuse to receive it according to its denomination or valuation, viz.: shillings for shillings, pence for pence, being tendered for any wages, fees, stipends, debts, etc., they should be punished as contemners of her royal prerogative; and to the intent that this mixed money should have the better course and circulation, it was further declared by the same proclamation that after the 10th day of June "*All other money which had been current within this kingdom before said proclamation, should be cried down and annulled and esteemed as bullion and not as lawful and current money of the kingdom.*"

It is presumed that history records no similar atte pt to force a degraded currency upon a conquered people, or a more extraordinary method, viz; that of decrying the pure coin.

At the day, mixed money was tendered and refused and the question at the Council table was whether the tender was sufficient, and in as much as the case related to the kingdom in general and was also of great importance in consideration and reason of State, Sir. Geo. Carew, then *lord deputy* and also *Treasurer*, requested

the Chief Judges to confer, who upon conference and consideration of *all the points of the said proclamation* resolved the tender was good.

The case as reported was with others translated into English, in 1762. It is hoped, says the editor, that a translation of them "out of the jargon, in which they have hitherto appeared, may not be unacceptable."

It was determined—

1. That it is necessary to have a certain standard.

2. It appertaineth to the King of England, to make or coin money within his dominions—*moneta dicitur a monedo—quia impressione nos moneat cujus sit moneta, cujus imago est haec? Caesaris. Date Caesari quae sunt Caesaris.*

3. So the King may change his money in substance and impression; and enhance or debase the value of it, or entirely decry or annul it; so that it shall be, but bullion at his pleasure.

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* Sir George Carew was, in 1600, made Treasurer of the army and one of the Lords Justices of Ireland. He was also President of Munster, and behaved with so much conduct and bravery that he reduced many castles and forts, took James Fitz Thomas, titular earl of Desmond, and O'Conor prisoners, and brought the Burkes' O'Briens, and many other Irish rebels to submission. He is the reputed author of "Hibernia Pacata."

Sir John Davies, who reported "The case of Mixed Money"—lawyer, scholar and poet—in 1603 was sent as Solicitor General to Ireland, and immediately rose to Attorney General. His biographer attributes these promotions to the patronage of Lord Ellesmere and the Earl of Salisbury, with whom he corresponded, and to whom he sent a very interesting account of a circuit he performed with the Lord Deputy in 1607. Such was Ireland then, that a guard of "six or seven score foot and fifty or three score horse was thought necessary protection against a peasantry recovering from their wildness." As his residence in Ireland afforded him many opportunities to study the history and genius of that people, he published the result of his enquiries in 1612, under the title of "A Discovery of the True Cause why Ireland was never entirely subdued till the beginning of his Majesty's reign."

He died suddenly of an apoplexy, after having supped with Lord Keeper Coventry and after having received from him assurance of being Chief Justice of England.

Billio est moneta defensa et prohibita—quae videlicet usu caret.

Anno 26 H. I, moneta veteri reprobata, nova successit."

Anno 32 H. III. The king was obliged to make new money,"*Cum moneta Angliae circumcidebatur a circumcisis Judaeis.*"

Anno 29, Ed. I. When the money called pollards was cried down, sterling was coined; and lastly, 2. Eliz. when all mixed, and base money was cried down, and the standard of pure silver established, which continues to this day. And in Ireland, John made the money, and it appears, the Irish and English standards were equal, and the English money was not a fourth part better in value than the Irish, as it hath been since Ed. IV. And it is observed, that the State of Rome, in the first Punic War, when Hannibal had possession of a great part of Italy, and all their treasure was exhausted, enhanced base money, to a great value for the payment of their armies—and yet the justice of that State was famous throughout the world; but *nihil est magis justum quam qnod necessarium;* by which it appears, that the mixed money was made by Queen Elezabeth, on a just and *honorable cause.*

4. It was resolved that the mixed money having the impression and inscription, &c., and being proclaimed. for lawful and current &c., *within the kingdom of Ireland*, ought to taken and accounted for sterling money—so called not from starling—or from the castle of Sterling—but as "*nummus*" is called from *Numa*—so sterling is called from the Esterlings, or *Ost Manni*, who first made the money in England of this standard.

THEN THE DOUBT PRIMA FACIE WAS HOW THIS MIXED MONEY SHOULD BE SAID TO BE STERLING.

And for the clearing of this doubt it was said that in each common piece of money there is *bonitas intrinseca*

and *bonitas extrinseca.* And this *bonitas extrinseca est formalis et essentialis monetæ*, and this form gives name and being to money—for without such form the most precious and pure metal that can be is not money.

It was signed, that the people might accept it without examination or trial; and it was said the king hath the same prerogative to give value, to base metal by his impression or character, as he hath to give estimation to a mean person by imparting the character of honor to him, "*sic fiet viro quem Rex honorare desiderat.*"

And it was concluded that after the Esterlings had made this pure English money, (which hath been a great honor to the nation &c.,) *all money coined by authority*, not only in England, but also in Scotland and Ireland *hath been sterling money whether the matter of it were mixed or pure.*

5. It was resolved that *although the mixed money was made to be current within this kingdom of Ireland, only yet it may well be said current and lawful money of England*, 1, because Ireland is only a member of the Imperial Crown of England; 2, it is called lawful money of England in respect to the place of Coinage, which was in England viz.: in the Tower of London.

And this was done upon good reason of state to prevent falsification of money.

And therefore before Norman Conquest all money was coined in monasteries, for it was presumed in such places no falsity or corruption could be found.

Since the reign of Edward VI. all the money *made* in Ireland hath been *coined* in England, and therefore the mixed money coined in the tower of London may be properly called current and lawful money of England.

Lastly it was resolved that the tender of mixed money was good, BECAUSE ALL OTHER MONEY WAS CRIED DOWN AND MADE BULLION, AND THIS MONEY ONLY ESTIMATED, SO

THAT IF THE *obligee had refused this* MIXED MONEY HE HAD COMMITTED A CONTEMPT FOR WHICH HE MIGHT BE PUNISHED.

This case was cited with approval, in the Metropolitan Bank *v.* Van Dyck, 27 N. Y. R., 455, as aiding in the determination of the question whether the act of Feb. 25, 1852, could justly be regarded as impairing the obligation of contracts.

In England, however, it was not approved in the case of Pilkington *v.* Commissioners of claims on France, 2 Knapp, 7, 19, where the effect of a mutation of money was discussed in a different spirit. Neither in Lansdowne *v.* Lansdowne, 2 Bligh, 60, where effect was given to a stipulation in a deed of settlement to pay in Ireland a sum in English currency.

It is hoped that viewing the legal tender act of 1862 in the light afforded by history it will be evident to all, that Congress wisely abstained from any attempt to embarrass the free currency of coin. Such an attempt would have been suicidal—nay, the act itself encourages the free circulation of coin.

The following additional examples are cited in further illustration of point B.

A. D. 1618. Gov. Argall, of Virginia, ordered "that all goods should be sold at an advance of twenty-five per cent., and tobacco taken in payment, at three shillings per pound, not more or less, *on the penalty of three years' servitude to the colony.*

A. D. 1641. The General Court of Massachusetts made order about payment of debts, setting corn at the usual price, and making it payable for all debts which should arise after a term prefixed.

A. D. 1643. The same General Court ordered that Wampompeag should pass current in the payment of

debts to the amount of forty shillings, the white at eight a penny, the black at four a penny, except county rates.

A. D. 1732. In Maryland, an act was passed, making making tobacco a legal tender at one penny a pound, and Indian corn at twenty pence a bushel.

It surely will not be argued that the last three legal tender regulations affected the legality or efficiency of sterling or other money contracts.

A. D. 1723. The province of Pennsylvania made its first experiment of a paper currency. It issued in March, £15,000, and made its bills a tender in all payments on pain of confiscating the debt or forfeiting the commodity and imposed sufficient penalties on all persons who presumed to make any bargain or sale on cheaper terms in case of being paid in gold or silver.

C.

In contemplation of the facts cited, it seems impossible that any one can seriously argue that the specie clause inserted in the bond in 1851 is unmeaning, because coin then constituted the only currency.

This argument imputes to the contracting parties utter forgetfulness of the past and blindness to the future, unless it be conceded that the act of Feb. 25, 1862 is unconstitutional and void.

Before paper money was contrived civilians had discussed the effect of contracts payable in coin of fixed alloy.

That in England the selection of co-existing currencies had been habitually made, is apparent from the tenor of the statutes and the reported cases above cited.

In America until long after the close of the Revolutionary War, similar contracts were familiar. Many such subsist until the present day. They are

specially referred to in the several "Scaling Acts" so called, which were enacted in Virginia, Pennsylvania, Connecticut. The Virginia Scaling Act is minutely set forth in Faw *v.* Marsheller, 2, Cranch 10.

In Dorrance *vs.* Stewart, 1 Yeates, 349, the contract was for £100 lawful money, between individuals who claimed to be citizens of Connecticut. It was remarked, that the expression, lawful money, was then peculiar to citizens of that State, and meant lawful money of Connecticut, and that the amount of the debt should be calculated by the Connecticut scale.

History repeats itself. Stable as the financial policy of the State might then appear, it was none the less probable because not foreseen by all that under certain conditions that policy would be reversed.

D.

For the recent cases which have been reported, the Court is referred to an article entitled "The Legal Tender Acts, their constitutionality and effect."

2 American Law Review, p. 403, April 1868.

Nothing can exceed the care and fidelity with which the decisions are there digested.

To the authors suggestion of a practical difficulty in rendering an efficient judgment upon a gold contract, it is submitted that the argument of Mr. Selden, p. 13 of his brief, furnishes a complete answer, to wit, that judgments are always rendered in the cheapest currency.

In Bush *vs.* Baldray, 11 Allen, 367; a defendant under a contract made in September, 1860, was charged with gold dollars, which he had received as the master of the plaintiff's ship, at their nominal value as dollars; and must have profited pecuniarily by the nefarious transaction.

Mather *v.* Kinike, 51 Penn. R., 425.

The Essex Co. *v.* The Pacific Mills, Mass., Apl., 1861.
Hurd *v.* Miller, 2 Duvall, 103.
Sears *v.* Dewing, Mass. Sup. Reports.
Hall *v.* Hiles, 2 Bush, Ky. Rep., 532.
Dulton *v.* Paillaret, 52 Penn. R., 71.
Bank of the Commonwealth *v.* Van Vleck, 49 Barb, 508.
Bank of Prince Edwards Island *v.* Trumbull, *N. Y. Times*, May 11, 1868.

In all these cases the contracts are treated as bullion contracts; and where they have been made since Feb. 25th, 1862, they have been treated as bullion contracts, BECAUSE posterior the legal tender act.

In arriving at a just determination of these actions, these Courts have not perhaps discriminated accurately in their method.

Without adopting the vigorous language used in Milliken *v.* Scott, 2 Nev., 582; that such contracts "stand in direct and brazen antagonism to the policy of the nation, and practically extended through the several States, during the rayless period of the nation's travail, would have inflicted a wound upon constitutional liberty, which the coming ages would not see healed;" they have generally decided heretofore, that coin contracts anterior to the act are against public policy.

Upon this assumption it is evident *a fortiori* that coin contracts posterior to the act are against public policy—and we have already seen that the resolutions of Congress and the earlier State Legislatures condemned such contracts in every form, whether solvable in coin or bullion.

In making a distinction between contracts precedent and contracts subsequent, these Courts have in fact reversed

the maxim, that a Statute affecting rights and liabilities should not be so construed as to act upon those already existing.

By the distinction only existing rights are destroyed. Future contracts are not affected.

If a contract solvable in coin as currency is pernicious, a contract solvable in bullion is equally pernicious.

The opinions in these cases are rather to be regarded as the first motions towards a return to a true and philosophical solution of the questions which have arisen and been discussed as to the scope and effect of the legal tender Act.

E.

In conclusion, attention is invited to the words of Locke, and of Huskisson, lately quoted by Mr. Edmunds in a speech in the Senate on the joint resolution pledging the faith of the United States to the payment of the public debt in coin, or its equivalent.

"A law cannot give to bills that intrinsic value which the universal consent of mankind has annexed to silver and gold." (Locke's Works, Ed. of 1801, page 22.)

"Laws, however severe, cannot alter the inherent and essential qualities which determine the relations of value. They may indeed impose the same denominations upon values essentially different, but the difference will not be the less perceived: for no restraint upon human actions can permanently or effectually countervail the nature of things. When, therefore, the currency of the country consists partly of gold of standard weight,

and the remainder of a paper currency, in fact depreciated, but clothed by law with the character of a legal tender, the denomination fixed for such paper currency being the same as for the coin, the latter will have an irresistible tendency to escape from the depreciation in which it is by law retained, so long as it continues in the character of coin; and, either by melting or exportation, it will recover its intrinsic value." (Huskisson's Speeches, vol. 1, page 130.)

The following language was used by Hon. Martin Grover, in an opinion delivered in this case:

"It is a legal fiction, contrary to a universally known truth, that paper made lawful tender by Congress is of equal value with gold coin in the payment of debts. There may have been debtors of that stern integrity who, having received the consideration upon a gold basis, have felt it their duty to pay the debt in something of equivalent value; but I feel sure that there never was one fool enough to act upon the belief, when gold was at a premium, that gold was of no more value than paper to pay debts, and for that reason to pay his debts in coin."

"I regard the conscience as anything but good that permits its possessor to borrow gold coin and contract to repay in similar coin, and then attempt to discharge the obligation with the same normal amount of legal tender notes, worth less than half as much as the coin. Should the Government attempt to pay in depreciated paper, debts agreed to be paid in coin, every right-thinking man would pronounce its conduct infamous. And Courts of Justice pronounce similar conduct of individuals agreeable to equity and good conscience! I cannot so regard it."

"This is the most important commercial question considered in the Courts of this State, except that of the constitutional power of Congress to make paper a lawful tender in the payment of debts. The effect of settling

the law so that parties can by contract protect themselves from the fluctuating intrinsic value of Government paper can scarcely be appreciated. I regard it as fortunate that the question is to be decided in time of peace, when it can be calmly considered uninfluenced by any fear that a decision either way be disastrous to the Government."

JOHN J. TOWNSEND,
Of Counsel,
for Plaintiff in Error.

Mrs. Lucy Green

SUPREME COURT OF THE UNITED STATES.

No. DECEMBER TERM, 1867.

FREDERICK BRONSON, Ex., Tr., &c.

Plaintiff in error.

agt.

PETER RODES, - - - - *Defendant in error.*

BRIEF AND ARGUMENT FOR DEFT.

S. S. ROGERS, for defendant, Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

FREDERICK BRONSON, Executor of the last will and Testament of Arthur Bronson, deceased.
Plaintiff in error.
against
PETER RODES, *Defendant in error.*

FACTS.

On the 16th day of December, 1851, one Christian Metz, a resident of Erie County, New York, borrowed of the plaintiff in error, as executor of the last will and testament of Arthur Bronson, deceased, and trustee thereunder,—$1,400 00 and to secure the re-payment thereof gave his bond conditioned to pay to said Bronson as such executor &c. said sum on the first day of January, 1857, with semi-annual interest, and gave his mortgage as collateral to the bond with the same conditions, said bond provided for the payment of the $1,400 00 in *gold or silver coin*, lawful money of the United States of America, and further provided that the payment should be made at such place in the City of New York, as defendant might appoint, and in case of his failure to appoint a place, then it should be deposited in the Merchants Bank of New York City, to the credit of said Bronson.

In 1853 the defendant in error purchased the premises covered by the mortgage, and assumed to pay the said bond and mortgage, and did pay to the said Bronson, the interest thereon semi-annually, up till and including the interest due January 1st, 1864. On the 10th day of January, 1865, the said Bronson having failed to appoint a place of payment, the defendant in error tendered said Bronson the amount unpaid on said bond and mortgage, in United States Legal Tender Currency, with a request to

him to satisfy said mortgage. Said Bronson refused to accept the money or satisfy said mortgage, on the ground that it should be paid in gold or silver.

The defendant in error, on said day, deposited said money so tendered in said Merchants Bank, to the credit of said Bronson as executor, trustee, &c. and brought this action to compel said Bronson to satisfy the mortgage. Said action was brought in the Supreme Court of the State of New York, and the same was tried at a Special Term of said Court, held at Buffalo, August 13th, 1865, the complaint of the plaintiff was by said Court dismissed and judgment entered for the defendant therein, from that judgment the defendant appealed to the General Term of said court, and said judgment was in all things reversed, and judgment was entered directing the defendant Bronson to satisfy of record said mortgage, and from such judgment, the defendant appealed to the Court of Appeals, of said State, and said judgment was in all things affirmed. See case reported in 34th New York Reports, page 649.

I.

This is not such a case as that an appeal can be taken from the highest court of law or equity of a State to the United States Supreme court.

II.

The plaintiff in error had by the terms of the bond and mortgage constituted the Merchants Bank of New York City, his agent for the acceptance of the money, and its acceptance of the tender was the act of the defendant.

III.

This is a case of Debt, it possesses all the elements of a debt.

1st. A loan of money.

2d. The sum is definite and certain.

3d. It is expressly agreed to be re-paid.

4th. The payment is to be made in dollars, lawful money.

5th. The number of dollars is specified.

6th. It is to be repaid with interest.

The defendant Rodes was indebted as he had assumed the payment of the bond and mortgage.

See matter of Denny, 2d Hill, 220.
Newell vs. People, 3d Selden, 124.
Bouvier's Law Dictionary, Title Debt.
Andrews vs. Murray, 9th Abbot, 8–14.
Radman vs. Munson, 13 Barb. 188, 197.

IV.

The Statute provides that greenbacks shall be legal tender in payment of all debts, public and private, except duties and interest on public debts, this then being a *debt* can be paid in these notes.

If this is not so full, effect cannot be given to the act.

This question has been decided in the courts of last resort in six states.—New York, Massachusetts, Pennsylvania, Connecticut, Michigan and Iowa, and no court of last resort has decided the other way, so far as I can learn.

See Metropolitan Bank vs. Van Dyck, 27th New York, 458.
Wilson vs. Morgan, 30th How. Pr. R. 386.
Rodes vs. Bronson, 34th New York, 649.
Schoenberger vs. Wolff, 1 Am. L. Reg. N. S. 234.
Reynolds vs. the Bank of Indiana, 1 Am. L. Reg. 669.
Wood vs. Bullins, 6th Allen, 516.
Schoenberger vs. Watts, 1 Am. L. Reg. N. S. 553.
Schellenberger vs. Brinton, 3d Am. L. Reg. N. S. 591.
Bushegger vs. Schultz, 4 Am. L. Reg. N. S. 95.

Warmhold vs. Schiliting, 16 Iowa R. 244.
6th Duvergier, N. 174.
Bouvier's Law Dic., Title Currency.
Pong vs. DeLindsay, (1 Dyer 82 a)
Davies Reports, page 28.
Barrington vs. Patten, 1 Dyer, 81 B. Fol. 67.

V.

Admitting this to be an agreement to pay in specific articles, the damages would still be $1,507 00, Pinney vs. Gleason, 5th Wendell 393,—and Fletcher vs. Derrickson, 3d Bosworth, 181–8,—and Brooks vs. Hubbard, 3 Conn. 58.

VI.

No effect should be given to the clause providing that the debt should be paid in gold or silver coin, lawful money, &c. for the reasons:—

1st. The sentences "gold or silver coin, lawful money of the United States," and "lawful money of the United States" at the time of the making of this contract were synonimous, gold and silver only were Legal Tender at that time.

2d. The contract is made with reference to the esisting laws, and whatever the law implies in the same as though it were incorporated in it, and you can no more contradict the legal effect than the express terms of a contract.

Bank of Albion vs. Smith, 27 Barb. 489.
Norton vs. Coons, 6 New York, 33.
Bushegger vs. Schultz, 5 Am. L. R. N. S. 95.

3d. The law declares Greenbacks to be of equal value with gold or silver for the payment of debts, and we have to go to the different Stock Boards of the country to find that they are of different value, and at these same Boards

the gold dollars issued at various times from the United States Mint, have different values, and no one could be found who would claim that they are not all legal tender; and should the Courts attempt to be governed in their judgments in such cases, by the prices of gold at the different Stock Boards, which of the many Boards would they select as their guide? for the value of gold was different at the same time at these various Boards; and shall they take its value at the time the Clerk of the Court commences or completes the entry of the judgment? for the history of the proceedings of these various Boards shows that the value of gold was constantly fluctuating.

VII.

It is said that the creditor, in case he is compelled to take the Treasury Notes, parts with a portion of his property to the man who owes him the debt, and that justice can not be worked out in any other way, than by compelling the debtor to pay in gold and silver, or its equivalent.

It may be assumed as a fact (and it was a fact,) that, as the parties resided at a distance from each other, no gold or silver was actually loaned, but that the transaction was the ordinary one for that period, that defendant drew his check on some Bank in New York, where his funds were kept, and sent it to the plaintiff, or what is more probable, that defendant's agent at Buffalo, sold the check to some local Bank, at a premium, and paid plaintiff State Bank notes. The remarks of Judge Wright in the Metropolitan Bank vs. VanDyke, 27 New York, 482–483, are exactly applicable, and the force of them is not at all weakened by the fact that he was speaking of a contract payable generally in "lawful money," because, he was refuting the claim of injustice in case a creditor was deprived of gold and silver. No injustice will ordinarily result to the creditor

in being compelled to receive Treasury Notes. There is not, and scarcely ever has been, any difficulty in reinvesting all the money desired to be invested at the legal rate of interest, though the money was in Treasury Notes. Defendant in this case does not desire the money, and only wants it still to remain on bond and mortgage. In his answere he says, "Defendant is willing, has offered, and still offers to extend the time of payment of said mortgage for the period of ten years." He can at any time convert them into gold bearing stocks and bonds of the United States, and will thus again receive in due time his coveted coin. Says Judge Daniels in 45 Barb. 618, "no persons have had less ground of complaint against Treasury Notes than the capitalists. For though by law obliged to receive them at their nominal value, he had the ability to invest them for the same amount, at legal rates of interest, and when the time for their redemption arrives he has the responsibility of the Government for their payment, whatever losses their depreciation may have entailed on those who receive them for their labor, and expended them for their sustenance, none of those losses have been borne by him, as long as the amount of his capital has continued unimpaired." These notes are promises to pay, and in due time, and that not long hence, will be paid in gold and silver On the other hand, what would be the result of the other rule. "If the creditor should be permitted to recover the market value of gold or silver, as distinguished from its legal value, he might, by recovering judgment against his debtor when the premium was at the greatest, collect as much more than the real debt owing to him, as the premium exceeded the market value of Treasury Notes. For by holding his judgment, and delaying its collection until the difference between the cheaper legal currency in which it would be payable, and gold and silver entirely disappeared, it would be as easy for the debtor to pay them in the latter, as it would be in the former—and as he would be bound to pay in one or the other, the creditor

would recover as much more than his actual debt, as Treasury Notes were depreciated below gold and silver, when the judgment was recovered."

VIII.

If it should be held that this was a contract to pay 1400 gold or silver dollars as such, then we contend that the damages for a breach of the contract must be ascertained by valuing the gold and silver when the money, by the terms of the bond and mortgage, fell due. This was in 1857, at which time, there is no proof, that gold and silver were above par.

Meason vs. Phillips, Addes Rep. 346.
Edgar vs. Bois, 11 Serg. & Raw. 445.

IX.

There is no force in the objection that this is an equity suit, and the party who asks the aid of a Court of Equity, must do equity. The mortgagor has done all the law requires of him, he has tendered to the mortgagee the amount of his claim in lawful money. The mortgage is an incumbrance upon his farm, and he wishes the incumbrance removed. There is nothing inequitable in compelling the mortgagee to take what the law says is his just due, and cancel his lien.

The case of a mortgagor upon a plea of infancy or usury refusing to pay the amount actually received, and asking the aid of a Court of Equity, is not a parallel case. In this case the mortgagor pays every dollar he borrowed in as good money as he borrowed, to wit: lawful money of the United States.

The disastrous results which would follow the reversal of the judgment in this case, should admonish the court to examine the case with great care.

SHERMAN S. ROGERS,
Attorney for Deft. in error.

STATE OF NEW YORK.

IN THE COURT OF APPEALS.

PETER RODES, *Respondent*,
Ag'st
FREDERIC BRONSON, Executor, &c., of ARTHUR BRONSON, *Deceased*, *Appellant*.

On the 16th day of December, 1851, one Christian Metz, and Barbara his wife, executed to the defendant, as executor, &c., of Arthur Bronson, deceased, a mortgage upon certain lands in the County of Erie, to secure the payment of fourteen hundred dollars, on the first day of January, 1857, "*in gold or silver coin, lawful money of the United States*," with interest semi-annually, on the first days of January and July in each year, "*in coin as aforesaid;*" such payments, both of principal and interest, to be made in such place in the city of New York as Bronson should appoint, and in default of such appointment, to be made to the credit of said Bronson, executor, &c., in the Merchants' Bank of said city.

Metz, on the 25th of March, 1853, conveyed the mortgaged premises to the plaintiff, Rodes, who assumed the payment of the mortgage, and paid the interest thereon, as it accrued, up to and including the interest due January 1st, 1864.

On the 10th day of January, 1865, the plaintiff tendered to the defendant, in the city of New York, $1,507 in United

States legal tender notes, and requested defendant to accept the same in payment of the mortgage, and to execute a discharge of the mortgage, which the defendant refused to do on the ground that the mortgage should be paid in gold or silver, instead of legal tender notes.

At the time of the tender, the market value in the city of New York of the legal tender notes, as compared with gold or silver coin, was as one to two and twenty-five hundredths.

This action was commenced in February, 1865, to obtain, on the foregoing facts, a judgment that the mortgage be satisfied. (*Fols. 34 to 42.*)

The cause was tried in August, 1865, at the Special Term in Erie County, before Mr. Justice Grover, who rendered a judgment dismissing the complaint with costs. On appeal to the General Term, that judgment was reversed, and a judgment directed in accordance with the prayer of the complaint, which was entered accordingly, and thereupon the defendant brought the present appeal.

The opinions delivered in the Supreme Court are at pages 18 and 31 of the case.

POINTS.

I.

This is an action in equity. One of the fundamental principles of such actions is, that he who asks equity must do equity.

The plaintiff having, for an adequate consideration, engaged to pay to the defendant fourteen hundred dollars, "*in gold or silver coin*," as the condition of discharging his land from the lien of the mortgage, must show, in order to sustain his action, that he has performed or has offered to perform his contract, or has been prevented from performing it by the defendant, to entitle himself to the relief demanded.

Both law and equity, and the consciences of all enlightened men, concur in the position that no duty, arising from

an unconditional contract, can be discharged without a literal or substantial performance, or offer of performance, by the contracting party, of his undertaking.

In courts of law, exact performance has always been required; but courts of equity, looking at the substance of human engagements, rather than the precise meaning of the words by which they are expressed, have held *substantial* performance sufficient.

The author of the "Treatise on Equity," says, "The subject matter both of law and equity is contracts; * * * * those particular contracts which are limited to the benefit of certain persons, and presuppose property and price; these (saith the Praetor, as the mouth and oracle of the law, and building his opinion on the *sure foundation of natural justice and equity*,) if they are not gained by ill-practice, nor made against the laws, I will see kept; for what can be so agreeable to human faith as the observance of those things which they themselves have approved of, and made a law amongst one another? In contracts, therefore, respect is first to be had to the things expressed in the agreement, *if they may possibly be obtained;* and for default of the things themselves, a sufficient equivalent is to be given." (*1 Fonb. Eq., book 1, ch. 1, §4.*)

II.

The plaintiff has not performed or offered to perform his contract, either literally or substantially, either in fact, in morals, or in law; nor has he given or offered any equivalent in lieu of performance.

1. There can be no pretence that he has performed it *in fact.* He has neither paid, nor offered to pay, any gold or silver coin.

The treasury notes are not coin. They are not such in the commercial, nor in the popular sense, and by the commercial and popular usage the language of the contract must be interpreted.

Some persons have attempted to derive the power of the government to make its notes a legal tender from the authority "to coin money" (Const., Art. 1, Sec. 8, sub. 5), but we believe the doctrine has not found many advocates. It is not consistent with the well established legal definition of the words (Co. Litt. 207 *a*, Thomas' Ed., vol. 2, p. 69 and note (y, 1); 2 Inst. 577; Bouv. Law Dic., Title *Coin*), and in our judgment cannot be reconciled with the first canon of interpretation, viz.: that it should be *reasonable.*

If, however, that doctrine were established, it would not affect the commercial and popular meaning of the words of this contract, which must be governed by the ordinary meaning of the terms used at the time when the contract was entered into. No one will pretend that at that time the word "coin," as used in the contract in question, meant any thing but metallic money.

2. The plaintiff's essay at payment falls equally short of performance *in morals.*

What he offered was not *the equivalent* of what he promised. The treasury notes were not half as valuable as the promised coin; and there is good reason to believe that the tender of them was made, not because the plaintiff believed them to be the equivalent of coin, but because he well knew they were not such equivalent. They would not pay half as much rent, nor purchase half so much food or clothing, or of any other of the necessaries of life, and this was well known to every body at that time. There was no difficulty in the way of his obtaining the coin, and no injustice in requiring him to do it. The same amount of wheat, or wool, or farm produce of any kind, which would have procured the $1,400 at the time of the loan, would have procured that sum in gold at the time of the tender.

The language of Doct. Witherspoon, in his able "*Essay on Money*," describing the effects of an inconvertible paper currency made a legal tender, is as applicable now as it was when written, nearly a hundred years ago. He says: "We

have seen this system produce a most ludicrous inversion of the nature of things. For two or three years we constantly saw and were informed of creditors running away from their debtors, *and the debtors pursuing them in triumph, and paying them without mercy.*" (*Witherspoon's Works, Vol. IV., p. 223.*) This case very perfectly illustrates the faithfulness of the picture so graphically presented by the Rev. Doctor and statesman.

3. The plaintiff has not performed his contract *in law.*

This question involves, *first*, the validity of the act of Feb. 25, 1862, so far as that act makes the treasury notes "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest" on bonds and notes of the United States.

And, *second*, if the act be in that respect valid, whether it is applicable to the present case.

First.—On the first question we insist, that the legal tender clause of that act, so far as it applies to *private debts*, is not valid, Congress not being authorized to pass it.

Using the language of Daniel Webster, we say, "Most unquestionably there is no legal tender, and there can be no legal tender in this country but gold and silver, either the coinage of our own mints, or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain, and of the very highest importance." *Webster's Works, vol. 4, page 271.*

At all events, if the act be valid as to debts contracted since it was passed, it is not retroactive, and does not affect debts previously contracted.

We do not purpose to argue these questions here, regarding them as settled against us so far as the Courts of this State are concerned, by the decision of the Court of Appeals, in the case of *Myer vs. Roosevelt, 27 N. Y., 400.*

The point is presented, merely to save these questions for the consideration of the Supreme Court of the United States, should the case ever reach that Court.

Second.—This brings us to the main question for consideration here, viz.: Whether, admitting the legal tender clause of the act of Feb. 25, 1862, to be valid, as applied to ordinary debts, it is applicable to the present case? In other words, whether a court of equity is compelled to regard the tender of paper dollars, in cases like the present, as the full equivalent of gold dollars.

In the discussion of this question, two facts must be conceded to us as fully established.

First.—That there was at the time of the tender, a *very wide difference in actual value* between the paper dollars tendered, and the coined dollars mentioned in the contract.

Second.—That the parties, at the time of the contract, anticipated some such difference as possible, and contracted in such terms as to fix their rights with entire certainty in reference to it, *if they had power to do so.*

The question then arises, whether there is any thing in the law, or in the policy of the government, which prohibits courts, in the administration of justice, from *recognizing the fact* of the wide difference in value between the coined dollars and the paper dollars; a difference which the parties anticipated and provided for in their contract.

The plaintiff insists, (and his action depends upon the position), that the law absolutely prohibits courts from recognizing such difference in value. The court below has sustained this position. "The law" says Judge Daniels, (fol. 78), "has impressed them"—[the treasury notes,] "with a legal value precisely equal with that of gold or silver coin of the same denominations for the purpose of paying indi-

vidual debts with them, and it *cannot permit a discrimination against them*, in favor of gold and silver, without allowing its authority to be substantially annulled." The meaning of this language, when applied to the facts to which the judge applies it, is, admitting the actual value--the purchasing power—of the gold dollar to be twice as great as that of the paper dollar, and admitting the parties to have contracted expressly in reference to that difference in value, both engaging, the one to deliver and the other to receive one kind of those dollars to the exclusion of the others, that courts are *prohibited by law* from recognizing the validity of such contract. This position we deny. If it is sound the judgment is right. If it is unsound the judgment is wrong.

It is certainly an alarming proposition, that any law of the government should be invoked, to prevent courts and officers from RECOGNIZING THE TRUTH, and the alarm is not lessened when the magnitude of the truth which we are called upon to ignore, is seen, and the gross injustice which ignoring it would produce, is understood.

Every just mind will conclude, instinctively, that there must be some fallacy in the reasoning which leads to such results.

So far (we apprehend) from our being required to ignore the difference in value between the paper dollars and the coined dollars of the government, the most cursory examination will show,

1st.—That the Acts of Congress recognize the difference.

2d.—That the government in all its dealings with individuals recognizes the difference.

3d.—That the courts, State and National, never try a cause involving the question of *damages*, without recognizing the difference.

4th.—And lastly, that there is not a business transaction among men, involving any question of value, in which it is not recognized. [In support of the last proposition, we shall

only refer to the daily prices current of gold, in the large commercial marts of the Union. The differences in value there indicated enter into every business transaction involving money of any kind in the U. S.]

FIRST—*The Acts of Congress.*

The very clause which makes the treasury notes a legal tender, recognizes the distinction.

"Shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, *except* duties on imports, and interest on government bonds and notes, which *shall be paid in coin.*" (*12 Stat. at Large, 345.*)

By the Act of 17th March, 1862, the Secretary of the Treasury is authorized to "purchase *coin* with any of the bonds or notes of the United States, authorized by law, at such rates and upon such terms as he may deem most advantageous to the public interest." (*12 Stat. at Large, 370.*)

On the 17th of June, 1864, Congress passed a law declaring that it should thereafter "be unlawful to make any loan of money not in coin, to be repaid in coin; or to make any loan of coin to be repaid in money or currency other than coin." (*13 Stat. at Large, 133.*)

By the third section of the declaratory act, approved March 10, 1866, all persons making returns of income, are required to declare in such returns "whether the rates and amounts therein contained are stated according to their values in coined money," and if such values are stated "in coined money" it requires the assessor "to reduce such rates and amounts to their equivalent in legal tender currency" and the taxes are estimated accordingly. (*See Appleton's Ed. of the Internal Revenue Laws, as amended in 1866, p. 110.*)

Other acts of similar import might be cited, but it is not necessary.

These acts not only recognize the distinction between treasury legal tender notes and coin, but they furnish a complete refutation of the position (alluded to above) that the legal tenders were issued under the power "to coin money."

Congress certainly does not regard the notes as "coin" in any sense.

SECOND—*The Practice of the Government.*

1. The government purchases coin at market rates in treasury notes, and it demands coin, and accepts of coin only for duties.

Well might Chief Justice Cartter say: "the very provision that required the duties to the government to be paid in gold, compelled the citizen to acquire the gold to make the payment; and if the right to receive it is established under the law, the right to purchase it for the purpose of paying it upon duties, is established under the law. The practical effect of taking away the right of the party to contract for the purchase and sale of gold, would be to defeat the purpose of the government to collect its revenue in gold." (*Thompson vs. Riggs, Infra.*)

2. The government has made various loans, some, as authorized by Congress, expressly payable, principal and interest, in coin.

6's of 1881 (12 Stat. at Large, 313).

5-20's (Id., 345, §2).

10-40's (Id., 709).

5-40's (13 Id., 13).

And others, payable in terms in legal money only; of course *any* legal money, whether paper or coin.

7-30's (12 Stat. at Large, 259).

3. The government, in times past, has borrowed in New York, for short times, large amounts of its notes at *five per cent. interest*, not made payable in coin—and at the same

office very large amounts of coin at *four per cent. interest*, payable *in coin*, and has issued its obligations accordingly.

4. It has also been in the habit of issuing checks at New York, and giving obligations, for COIN DEBTS, *payable in coin*, as distinguished from legal tender notes.

5. Where sales of merchandise have been made, *for coin*, the government demands as the tax on such sales ($\frac{1}{8}$ per cent.) not $\frac{1}{8}$ per cent. on *the sale price in coin*, but $\frac{1}{8}$ per cent. on the amount of legal tender money of which such sale price in coin is the equivalent.

6. Among the questions which the Assessors of United States taxes are required, by the instructions from the Treasury Department, to ask, is this: "Is your report made on the basis of gold?"

Suppose a man owning a large amount of stock, were to elect to take his dividends *in gold* at its market value, and claim to be taxed on his income, only on the amount of the gold. Would the Assessor allow the claim?

See Statute of March 10, 1866, quoted above.

7. Since 1834, when parties have had their goods invoiced at their value in the gold coinage prior to that date, the government has seized and forfeited the goods for undervaluation.

8. The government, not long since, directed a public sale of cotton to be paid for in *specie only*.

Suppose the purchasers had offered legal tender notes, at their nominal value, to satisfy their bids; would the government have accepted the notes and delivered the cotton? The officers were bound to do so, if the law does not allow them to distinguish between the value of coin and of such notes.

THIRD—*The Action of the Courts.*

That *Courts* recognize the difference in value between coin and legal tender notes, and must of necessity do so whenever any considerable difference exists, is very clear.

This necessity arises from a familiar law of currency, viz.: that two kinds of currency, differing in their *market* value, as compared with the *governmental* valuation, cannot circulate together. The cheaper supersedes the more valuable, which ceases to be used as currency, and becomes *a commodity* subject to purchase and sale, like other commodities, according to the measure of its value in the cheaper currency. (*See Mill on Political Economy, B. III, ch. 10; New York Ed., 1864, Vol. 2, p. 47.*)

Mr. Pollock, Director of the Mint at Philadelphia, in a letter to the Comptroller of the Treasury Department at Washington, dated Sept. 28, 1861, says: "Drafts are payable in whichever metal predominates in the currency, and not in either indiscriminately; or rather the payer takes his choice. In almost every country one kind of coinage, gold or silver, is subsidiary to the other, or else stands at a premium, *and so is not currency, and does not afford a standard of international valuation.*"

Our gold coinage of 1833, and of older date, has never been currency since the reduction in the value of the gold coin then made; but, on the contrary, it has been dealt in *as bullion*, subject to purchase and sale at its valuation in the cheaper currency which followed it.

Such is now the case with all gold and silver coins. They are *still lawful money* of the government, but they no more appear as currency, in ordinary transactions, than do horses and cattle, or wheat and corn; and like those they have assumed the position of *commodities*, subject to purchase and sale, according to their value in the cheaper currency, treasury notes.

This is a universal law of currency, and one which no government has power enough to control. No legislation can make two kinds of currency, of unequal values, circulate together as equal. It could as easily abolish one or all the axioms of mathematics, or (which would be more analogous) it could as well declare a set of axioms contradictory of those in use, and require mathematicians to work by both sets indiscriminately.

Indeed the position of our opponents does contradict one of the mathematical *axioms*. That position may be correctly presented syllogistically thus: Two paper dollars are equal to a bushel of wheat,—one gold dollar is equal to a bushel of wheat—but a gold dollar is exactly equal to a paper dollar, therefore things that are equal to the same are not equal to one another.

This difference in value, therefore, between several kinds of currency (where such actual difference exists), is *an ever present fact, with which all courts are required to deal*, and with which they do deal, whether consciously or not, whenever they investigate or pass upon a question of value or of damages.

We venture to assert that courts, in all cases involving damages, or values, not only recognize the difference in value between the different kinds of currency, but they *invariably* assess damages and render judgment by direct reference to *the cheapest* of the two kinds of currency.

Suppose a trial for the conversion of 1000 bushels of wheat, converted at a time when wheat was worth $2.00 per bushel in treasury notes, and gold was at 100 per cent. premium. How would the court pronounce judgment in such case?

In gold, which is one government standard, the damages are only $1000; in treasury notes, the other government standard, the damages are $2000. What shall be the judgment of the court?

The defendant says to the court: By the government standard of gold the plaintiff is injured only $1000, and you

are not allowed by law to recognize any difference in value between gold and treasury notes; the judgment therefore should be for $1000 only.

The plaintiff says: By the government standard, treasury notes, I have been injured $2000, and the law makes treasury notes and gold of equal value. The judgment therefore must be for $2000.

Now gold is certainly *not outlawed* by the new currency of treasury notes. It remains as it was before, *lawful money* and a government standard of value; at least as much so as legal tender notes.

If the position is sound that the law forbids the recognition of any difference in value between gold dollars and treasury note dollars, why has not the defendant a right to demand that the judgment shall be for only $1000? And, on the same assumption, why has not the plaintiff an equal right to demand a judgment for $2000?

I leave the advocates of this *legal equality* doctrine to get out of this dilemma in the best way they can. I see no escape from it without the abandonment of the doctrine.

To us there is no dilemma. The court has a right to recognize THE TRUTH, WHOLLY, BOTH OF FACT AND LAW: on the one hand, that the gold dollars and the paper dollars have different *actual* values, and on the other, that they have equal legal values in *the direct cancellation of debts;* and as it is apparent that the defendant, having the right to pay the judgment when rendered in either currency, will of course elect to pay in the cheapest, it renders the judgment for the sum which, paid in that currency, will make the plaintiff whole for what he has lost.

Where different kinds of currency, having the same legal value, have different *actual* values, justice never is and cannot be administered upon any other basis than that above suggested. The amount of a judgment is always graduated by the cheapest currency in which it can by law be cancelled.

A few examples will show the indispensable necessity of the rule for which we contend.

Suppose prior to the time when any legal tender notes were issued, or authorized, parties had entered into a contract, the one to pay to the other $1,000, in the gold coinage of 1833, or of a prior date, or (which is the same thing) to *deliver* 100 gold eagles of that coinage. What would have been the measure of damages (after 1834, when the value of the gold coinage was reduced ten per cent.) for the breach of such a contract? If our rule of damages be not correct, then the party bound to deliver, might have the 100 *old* eagles in his pocket, when his contract became due, and instead of delivering them in performance, as duty would seem to require, might sell 90 of them, for 100 *new* eagles, and deliver the latter in full performance of his contract, keeping the remaining ten for himself.

We cannot subscribe to a doctrine which produces such unjust results. What writers on Political Economy think of the *morality* of such a doctrine, is very clearly shown by Mr. Mill. Political Economy, B. III., ch. 7., §3.

A merchant gives his clerk $1000 in gold, to pay duties. Instead of paying the duties, the clerk sells the gold for $2000 in treasury notes, brings back $1000 of these to the merchant, and keeps the balance. Or, suppose he keeps the $1000 in gold and allows himself to be sued for it. In the one case he has cancelled his liability (he received $1000, and has returned $1000), in the other he has taken only $1000, and is consequently liable only to a judgment of $1000, which he can immediately cancel, through the instrumentality of *one-half the gold he took.*

A gives $1,000 in coin to a common carrier for transportation, and he appropriates it to his own use. A can recover only $1,000 damages, which the carrier will cancel with one half the coin delivered to him.

Suppose Adams & Co. should appropriate to their own use the next shipment of coin sent to pay interest on government bonds, and deliver instead an equal amount of legal

tender notes. The notes and the coin, "being of *equal value in law*," as our opponents say, the government is of course *in point of law saved harmless !!*

Every banker with whom the merchant has deposited coin, in preparation for paying duties on the cargo of his expected ship, can return it in paper, and the merchant sustains *no legal injury !!*

Every broker who collects government coupons in gold, can pay the amount in green-backs to the owners of the coupons, and it must be regarded as "a fair business transaction."

Every sheriff who levies upon a quantity of gold coin, can respond for its nominal amount in legal tender notes, and pocket the premium on the gold.

Every executor and every receiver into whose hands gold may come, can do the same.

Does not the gross injustice to which the doctrine, that the law does not allow the recognition of any difference in value between gold dollars and paper dollars, of necessity leads, SHOW CONCLUSIVELY THAT THE DOCTRINE CANNOT BE SOUND.

But it may be said that, conceding the correctness of what we have stated as to the rule of damages for torts and breaches of faith in regard to coin, the same rule does not apply in case of contracts to pay in coin.

We concede that, upon a contract payable *generally in dollars*, whatever was the consideration (whether gold coin or anything else), and whatever may have been the value of the dollars recognized by the law when the contract was made, and however the dollars recognized by law when the contract comes to be performed, or when judgment comes to be rendered, may differ from those, no judgment can be rendered except for the *number of dollars specified in the contract*, together with interest. (*Story on Promissory Notes*, §§ *393–395*; *Id. on Conflict of Laws*, § *313*, *and note 2*, *and* § *313*, *a.*)

Where parties have entered into *such contracts* they must

pay and receive what the government may have lawfully made *dollars* at the time of performance. The government may in the mean time appreciate, or it may depreciate the dollar. In the one case the *debtor* loses, in the other the *creditor*. This is according to their contract. They mutually agreed to take this risk, and the risk may be regarded as equal. The change (*if we do not look at history*) might as reasonably be expected one way as the other.

But whenever the parties by their contract have determined not to run this risk, and have therefore fixed a particular standard by which one is to pay and the other is to receive, by describing the particular currency in which payment is to be made, then, in an action for the breach of such contract, the rule above referred to must apply, and judgment must be rendered for such sum as, when paid in *the cheapest currency which will lawfully cancel the judgment*, will be equal in value to the currency promised in the contract. *On no other basis can justice be administered.*

It may be said that some of our examples present cases of tort, and not of contract; but this is immaterial. The measure of damages, in an action of tort for the wrongful conversion of property (excluding cases where exemplary damages would be allowable) would be exactly the same ordinarily, as in an action for the failure to deliver the same property in pursuance of a contract, where the price had been previously paid.

The foregoing considerations seem to us to establish conclusively, not only the proposition that Courts of justice always recognize the difference in the market values of different kinds of currency, where such difference of value to any considerable extent exists, but also that it is not possible to administer justice without such recognition.

III.

Our position is not, as some suppose, calculated to depreciate the government credit and to depress its securities, but

is equally applicable, when the government securities are *more valuable* in market than gold, as it is when they are *less valuable;* and also to coinage of different values, with which the *credit* of the government has nothing to do.

Suppose the legal tender notes (originally convertible at the pleasure of the holder into the 5-20's) should be made by Congress convertible, at the pleasure of the holder, into *any* of the long bonds of the government. The time will surely come when the value of such bonds, or some of them, and consequently the value of the notes, if thus convertible, will *exceed their nominal value in gold.* Under such circumstances gold would become the cheap currency (or, rather, would become *the currency*), and the notes would retire from circulation, and be held as securities, as bonds and mortgages and stocks are now held, and would be subject to purchase and sale according to their value in gold, as gold now is according to its value in treasury notes. The notes and gold would have *changed places*, according to the law of currency above referred to.

Under such a state of facts, in an action on a contract to pay *specifically in treasury notes*, the damages for non-payment would be, not the number of dollars specified in the treasury notes, and interest, but such an amount as, in gold, *the cheaper currency, in which the judgment may be cancelled*, would, at the time when the treasury notes were due, have purchased the amount of treasury notes provided for in the contract, together with interest on such amount of gold, to the time of judgment. It is easy to see that the contrary rule, against which we are contending, would make no approach to justice. Suppose, in such case, the market value of treasury notes to be as much above the value of gold, as we have before assumed the value of gold to be above that of treasury notes, viz: 100 per cent., or two to one. If our position is not sound, the party under obligation to pay or deliver an amount of treasury notes, might have the notes in his pocket, ready to perform his contract according to its terms, when it became

pay and receive what the government may have lawfully made *dollars* at the time of performance. The government may in the mean time appreciate, or it may depreciate the dollar. In the one case the *debtor* loses, in the other the *creditor*. This is according to their contract. They mutually agreed to take this risk, and the risk may be regarded as equal. The change (*if we do not look at history*) might as reasonably be expected one way as the other.

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due, but instead of doing so he might sell *one half of the notes* for an amount of gold nominally equivalent to the whole amount of notes, and with that gold could cancel his contract. In other words, he can exactly half perform his contract, keeping the value of the other half himself; and this, in the opinion of our opponents, would be *lawful*, and of course *honorable*.

In this case, if any thing in the way of currency is discredited by our position, it is *gold*, and not the government securities.

If before the legal tender notes were issued, an action had been brought upon a contract to pay $100 in the silver coinage of 1852, which was worth only 94 per cent. in the gold coinage then existing, and was made a legal tender only for sums not exceeding $5.00, a judgment for non-delivery of the silver should not have been for $100, the nominal amount of money contracted to be delivered, but only for $94; gold being the cheapest currency in which the judgment could be discharged, and $94 in gold being the full equivalent of the $100 dollars of silver contracted to be delivered.

These examples show (if we can comprehend the matter), that our position discredits neither gold nor securities. It is merely calculated to secure *justice*, and to *discredit injustice, and defeat iniquity.*

IV.

The *letter* of the act of Congress will be invoked against our position, but furnishes no answer to it.

The language of the act is, "such notes shall be receivable, in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be *lawful money and a legal tender in payment of*

all debts, public and private, within the United States, except duties on imports, and interest as aforesaid."

Now we concede that it is necessary for us to establish the position, that the claim of the defendant is not *a debt*, within the meaning of that term, as used in the statute, or our argument fails. If we establish this position, then our argument must be sustained.

Mr Selden's meaning is fully explained at the foot of page 23.

We say that this claim for *gold and silver coin* is not a "debt," within the meaning of that term as used in the statute. *First*, because the amount of the demand is not liquidated, in the currency in which the court *practically* pronounces its judgment. In one sense, any obligation which one person is under to another is regarded as *a debt*. If a merchant has bought 100 bales of cotton and paid for it, and the cotton has not been delivered, the seller owes him the cotton, and is *indebted* to him to that extent. No one, however, will pretend that the seller could cancel the obligation by *a tender* of either coin or legal tender notes. Why then could not this be done? Both the coin and the notes are a *legal tender* for all *debts*, by the express terms of the statute. Why then could not this demand be cancelled by coin or notes? Simply, because before either payment or tender can be made applicable to any demand, *the exact amount of such demand must be authoritatively ascertained.* And it must be ascertained in the currency in which the court pronounces the judgment. Until that is done, no tender can be effectual. Indeed, without that, the doctrine of tender is not applicable to the case.

In such case the seller would have two courses. He could deliver the cotton according to his contract. That of course would be *performance.* It would be neither payment nor tender. If he could not, or did not choose to perform his contract, the only remaining course would be the *payment of damages for non-performance.*

Such damages would be payable either in coin or in legal tender notes, but before they could be paid or tendered in

either *the amount must be exactly ascertained.* This could only be done by agreement between the parties, or by legal adjudication. Of course the claimant in such case would agree only upon such a number of dollars as the measure of his damages, *as, when paid in the cheapest currency which could legally be tendered in satisfaction of them after the amount was fixed, would fully indemnify him for his loss.*

If the parties appealed to the courts to adjust the amount of damages, we have already seen that the courts would adjust them upon the *same basis, with reference to the cheapest currency.*

This example applies to every case where the debt or demand is unliquidated.

No debt or demand, therefore, the precise amount of which is not ascertained, is a "debt" or "demand" within the legal tender clause of the act above cited.

Secondly.—The further question then arises, whether in an action upon a contract to pay a certain sum in one specified kind of currency, which is either more or less valuable in fact than another kind of currency which is authorized by law, and in which the judgment of the court may be cancelled after it is rendered, the claim of the plaintiff is to be regarded as a liquidated, or as an unliquidated demand.

On this subject we have said above, under points II and III, all that is requisite to show that such a claim is of *necessity regarded as unliquidated*, and that it is the duty of the courts to adjust, and they do always in fact adjust, the damages in such cases with reference to the value of the cheapest currency in which the judgment can be satisfied.

The case put, of a contract to pay a certain number of the eagles of the coinage of 1833, is one where the damages in *dollars* (generally) will exceed the number of dollars contracted for, and the interest. And on the contract to pay in the silver coinage of 1852, the damages in *dollars* will fall short of the number of dollars contracted for.

In such cases, where the parties have contracted for the

delivery, specifically, of one of the several kinds of currency, they do by their contract treat the article te be delivered (as it is practically, in commercial transactions, treated in fact), not as *currency*, but as a *commodity*, subject to purchase and sale, like wheat or cotton, according to its value in the practical currency of the day. Such are all the contracts at the present day for the purchase and sale of gold. And are not those contracts valid? May not the merchant *lawfully and effectually* contract for the delivery of gold to pay his duties? In case of the breach of such a contract, how will courts measure the damages? Will they treat them as a fixed sum, limited to the number of dollars specified in the contract? or, will they treat them as unliquidated, and adjust them in reference to the value of legal tender notes, in which the judgment will be paid?

Suppose the Secretary of the Treasury shall sue some merchant who bids off cotton on the terms of payment in coin; will he accept a judgment for the number of dollars bid in coin? Not at all, we apprehend. The claim on a bid of $1,000 in coin will not be a liquidated claim for the $1,000 and interest, but an *unliquidated* claim for such a sum in treasury notes (in which the judgment may be paid) as would equal in value the $1,000 in coin at the time when that should have been paid.

The $1,000 bid of the merchant is in one sense *a debt*, but is it a debt that can be discharged by the tender of $1,000 in treasury notes? Clearly not. The $1,000 in coin is treated by the parties not as *currency*, but as a *commodity*. The merchant can *perform his contract* by *delivering the commodity* according to its terms. If he fails in this, he cannot cancel the damages for which he will become liable through his default, by any tender of treasury notes, because the damages for his non-performance are *not liquidated*, and the doctrine of *tender* is not applicable to the case.

V.

This train of reasoning brings us to the radical position upon which our claim rests, viz: that the promised coin is

not *currency*, but is a *commodity*, and is so treated by the contracting parties. Damages for the non-delivery of such commodity are to be measured, not by the number of coins promised, but by their *value* in treasury notes—the *currency* in which the judgment will be cancelled.

By the Act of March 17, 1862, heretofore alluded to, the Secretary is authorized to "purchase coin with any of the bonds or notes of the United States authorized by law, at such rates and upon such terms as may be deemed most advantageous to the public interest."

Suppose the Secretary has purchased a hundred thousand dollars of coin, and paid $150,000 of treasury notes for it, taking the obligation of the seller to pay into the treasury at New York, the next day, the $100,000 in coin. That obligation certainly, in one sense, creates *a debt*, but is it a debt which can be cancelled by a tender of $100,000 in treasury notes? Or, if the delivery be not made of the coin, and the party is sued, are the damages for his failure to perform his contract fixed and liquidated, so that the judgment against him must be limited to *the number of dollars* specified in his obligation? If so, the judgment could be cancelled by $100,000 of the notes paid to him, and he would pocket the remaining $50,000, *as the profits of the transaction!*

The unjust result here indicated, *must follow*, if a contract specifically payable *in coin*, in the present state of our currency, constitutes "a debt" or "demaad," within the meaning of those terms as used in the first section of the act of February 25, 1862.

It clearly does not constitute such a debt or demand, for the reason (recognized by Congress in the act of March 17, above quoted) that, in accordance with the great law of currency heretofore alluded to, which is beyond the control of governments, the results of which neither governments nor courts can ignore, coin has ceased at present to be currency, and has become practically a commodity, subject to purchase and sale,

like all other commodities, at its value in treasury notes, the only practical currency.

All such contracts, if not literally performed, present claims for uncertain, unliquidated damages; to which the terms "payment" and "tender" used in the statute, can have no application, until the amount of damages sustained by the default has been *exactly ascertained*, either by agreement of the parties, or the judgment of a court. *When so ascertained*, it is *a debt*, within the meaning of the statute, and may be cancelled by the tender of the amount in treasury notes.

Ch. J. Cartter (in *Thompson vs. Riggs*, before referred to) very correctly says, "This law does not affect to pronounce what the *value of a contract shall be*, but when such value is ascertained, how it shall be satisfied. The term indebtedness, in the sense of the statute, *has no significance until the amount of indebtedness is arrived at*, by the value fixed to the contract by the parties."

An engagement, therefore, to deliver a specified amount of coin, does not, in the present condition of our currency, constitute *a debt* (within the meaning of the statute in question) of the precise amount of coin promised, which can be cancelled by the tender of that amount in legal tender notes. On the contrary, such an engagement is a contract for the *delivery of a commodity* of a certain value in the *actual currency of the country*, and such value must be *exactly* and *authoritatively* ascertained, before it becomes *a debt*, subject to be cancelled by a compulsory payment or tender of such currency.

It is conceded by the Supreme Court, (*fol.* 82,) that this position would be correct if the contract were "to deliver" fourteen hundred gold or silver dollars, instead of being to "pay" fourteen hundred dollars in gold or silver coin. That this is a distinction without a difference we shall show hereafter.

We do not deny that treasury notes are a lawful tender for *all debts*, whether they arise out of engagements to deliver

See note in the margin of page 19.

coin, or to deliver cotton, or out of any other engagements or liabilities of any possible kind; but the question,— *What is the amount* of the debt, and when and how is such amount *definitely ascertained*, so as to become liable to be cancelled by a tender or compulsory payment, must be determined before such payment or tender can be effectually made.

VI.

There have been many decisions in the Courts, in actions upon private contracts containing clauses similar to that in the contracts under discussion, and although the decisions are conflicting, the greater part of them, and those which appear to us best considered, are in accordance with our positions. Some of the decisions are directly in point, and others bear upon the questions more or less nearly. We shall only briefly refer to them, having before said in argument all which the question, important as it is, seems in our judgment to demand.

In *Thompson vs. Riggs* (not reported) the Supreme Court of the District of Columbia decided that on a deposit of coin in bank, expressly to be repaid in coin, the broker could not discharge his obligation by an offer of legal tender notes instead of coin.

The very able opinion of the Court was delivered by Chief Justice Cartter, and has been printed in pamphlet.

We would remark that it is wholly immaterial whether the deposit was made in coin, or treasury or bank notes, or anything else. If it was made in a depreciated currency more of it would be required, in proportion to the depreciation, before the banker would engage to pay in coin. We infer from the opinion in *Thompson vs. Riggs*, that a part of the deposit was in depreciated bank notes, with an allowance for the depreciation to make them equal with coin. The consideration of a contract, provided it was a lawful one, is wholly immaterial in an action to compel the performance of the contract, or to recover damages for the breach of it.

In *Carpenter vs. Atherton*, in California, a decision was made in exact accordance with that in *Thompson vs. Riggs* (*4 Am. Law Reg., N. S., 225. See Mr. Redfield's Note, in the same vol., at p. 165.*)

In the case of *The Nova Scotia Telegraph Company vs. The American Telegraph Company*, in the Supreme Court of Nova Scotia, the U. S. legal tender notes were held not sufficient to discharge a rent payable in "dollars and cents of the United States currency." Able opinions were delivered by all the judges—all concurring in the same conclusoin. (*4 Am. Law Reg., N. S., 365.*)

The U. S. Circuit Court in Philadelphia, Mr. Justice Grier presiding, in *The Philadelphia and Reading Railroad Company vs. Moulson*, decided to the same effect.

In Kentucky, Chancellor Pirtle decided "that the maker of a note, in 1863, promising to pay *in gold*, must pay at maturity the actual gold coin, or *its equivalent* in Treasury notes."

This principle has since been affirmed by the Court of Appeals of Kentucky, one judge dissenting. The case as given in the newspapers was as follows, viz:

"On the 2d of March, 1863, Armstead Miller, for the consideration of $1,250, sold, and on the 14th of the same month conveyed to H. T. Hord, about 24 acres of land in Jefferson County, Kentucky, with a lien reserved, and a covenant of general warranty on the express condition of full payment of the price as prescribed in the contract. Three hundred dollars of the price was paid in advance at the date of the contract, and two promissory notes for $475 each were executed for the residue, payable in six and twelve months.

"The last of these notes was expressly made payable in gold, because, as proved, that proportion of the land was sold at a gold price, which was then 72 per cent. less than Miller required in current paper. After this last note became due, Miller refusing to accept as full payment its nominal amount in United States Treasury notes, Hord filed a peti-

tion in the Chancellor's Court of Louisville to compel him to take the amount in such notes then tendered in Court, and to release his lien on the land.

"The answer, as a cross petition, insisted on a specific execution, and sale of the land, if necessary for enforcing it.

"The Court decided that the contract must be specifically executed, and directed the sale of so much of the land as might be necessary to pay the value of the gold still due. The constitutionality of the tender act of Congress was not involved in this case, for the appellant's promise to pay in gold for a valuable consideration received for the difference between paper currency and gold, may be specifically enforced in equity, like any other binding contract, the specific enforcement of which may become proper for the effectuation of full justice according to the intention of the parties."

Judge Sutherland, in two cases in New York, on sale of goods for gold, held that the recovery should be the value of gold in legal tender notes.

A like decision was made by Judge Brady, in the New York Common Pleas, in a suit in regard to coupons of the Mariposa Company payable in gold.

Similar decisions were made in the Superior Court of the City of New York, on contracts for salaries expressly payain coin.

In *Prouty vs. Potter*, in the Supreme Court of New York, railroad bonds valued at $47,000 had been deposited with the defendant as collateral security for the payment of a note for $11,000, payable "in gold or silver coin." The plaintiff tendered the amount of the note at maturity, in legal tender notes, and demanded the bonds; which being refused, he brought his action to recover the bonds. The defendant had judgment, on the ground that payment of the note could only be made in coin.

In adjusting dividends of a Mutual Insurance Company on account of unexpected premiums on expired policies, where some of the premiums had been paid in gold,

on policies upon which the losses were payable in gold, and other premiums had been paid in paper, on policies the losses upon which were payable in paper, it was held by Mr. Justice Miller, that those who had paid premiums in gold, were entitled to certificates for an increased amount, so as to place them on an equality with the holders of certificates for ordinary policies. (*Luling vs. The Atlantic Mutual Insurance Company, 30 How. Pr. R., 69.*)

The Commissioner of Internal Revenue has made the following decision:

If, under the terms of a will, the legatee can demand of the executor the delivery of gold, he cannot be held to receive it as a legacy of money merely, for in such case the executor would be discharged by a payment in currency. It must, therefore, be treated as a specific legacy, the clear value in currency of which at the time the legatee received it, would be taxable.

Two cases in the United States Supreme Court, which arose under the charter of the State Bank of Arkansas, involve the same principle, and were decided the same way.

Paup vs. Drew, 10 How., 218.

Woodruff vs. Trapnall, Id., 190.

The cases of an opposite character, so far as they have fallen under our observation, are the following:

Wood vs. Bullens, 6 Allen, 516.

In this case it was held, in an action on a note payable *in coin*, that judgment could only be given for the number of dollars expressed in the note and interest, although the judgment might be discharged by legal tender notes of much less value than coin. The reasoning of the court, by Chapman, J., in support of its judgment, is based principally on the fluctuating character, as to value, of the paper currency, and the possible injustice which might result if the court should regard it as the basis of its judgment. It did not occur to the court that it was doing a *certain* injustice, by its judgment, to prevent a merely *possible* injustice which time might produce, if a just judgment were then rendered and pay-

ment of it should be delayed. Nor did it occur to the court that the change which might result from delay was quite as likely to injure the plaintiff, from the further depreciation of the paper in which the judgment might be paid, as to injure the defendant by its approximating to the specie standard.

The difficulty which the court pointed out in that case, is one which inheres in all human transactions involving money or values, *the judgments of courts not excepted*, so long as we may have a currency subject to such fluctuations as always attend a currency of paper when made a legal tender. That difficulty will be *not in the least degree removed*, but on the contrary it will be *greatly aggravated*, if courts refuse to recognize the difference in the actual values of the different kinds of currency.

For *one purpose, and for one purpose only*, the statutes make the two kinds of currency equal, that is, *for satisfying debts (and of course judgments)*; but where the different kinds of currency are involved in actions of tort, or in actions on contracts, where the parties have specially referred either to the one or to the other, as a standard of value, there is nothing in any statute to prevent the courts in ascertaining damages for such torts or on such contracts, from recognizing the different *practical* values of the different kinds of currency, and assessing damages and rendering judgments accordingly. Indeed, if we are not mistaken, they cannot administer *justice*, or anything that answers to that name, without doing so.

Judge Chapman enforces his reasoning by the following illustration: "A judgment in a suit upon a note, must be rendered for a certain sum in money, expressed in dollars and cents. Execution must issue for this sum, with costs; and the amount is to be collected. If we were to add to the amount of the note and interest, a further sum, for example, one hundred dollars, as a premium on specie, the execution would still be collectable in money. If the officer could seize a sufficient amount of gold or silver to pay the execution and costs, he could pay to the plaintiff the specie, and thus the plaintiff would obtain more than the amount of his debt

If the defendant's goods should be sold at auction on execution, and the purchaser should pay in specie, the same result would follow."

What Judge Chapman says in regard to the injustice which would result from such a judgment as the plaintiff demanded, may be answered by saying, that, if the Judge's position, that no distinction can be recognized between gold dollars and paper dollars be correct, the *practical* result in such a case as he puts would be that the officer making the levy would pocket the gold, and apply an equal amount of greenbacks on the execution. If there be no flaw in the Judge's logic, I do not see how the worthy officer in such case could be censured. His act would be in exact accordance with the justice and morality of the judgment.

The true answer, however, to the Judge's position is, that law and justice concur in such a case in requiring the officer to advertise the coin and sell it for what it will bring in the cheapest currency which will discharge the judgment. The officer in such case is the *statutory attorney of the defendant*, put in his place by the law to pay his debt out of his property, and is bound to be vigilant in making such payment as little burdensome as possible to the defendant's property. Coin, under such circumstances is not (as I have already shown), currency, but is a commodity, and should be sold as much as bullion should be sold under like circumstances. Indeed it is bullion, weighed and marked by the Government, and nothing else, so long as it is driven out of practical use as currency, by a cheaper currency authorized by law.

Another answer would be that it was the duty of the defendant to pay the judgment himself, and if he had coin to pay it, he should have *sold the coin himself*, and paid the judgment.

In reference to this case we may be allowed to say, that the court, as well as the sheriff, was one of the instrumentalities appointed by law to compel the defendant Bullens to perform his contract, or render *an equivalent in damages*; and that the judges have fallen exactly as far short of *justice* in the

discharge of that duty, as the sheriff would do by pocketing the coin and returning greenbacks, though the motives governing the parties would be very different.

Decisions similar to that in *Wood vs. Bullens* have been made by the Supreme Court of Pennsylvania, in cases where treasury notes were tendered in satisfaction of ground rents payable *in coin*.

The opinions of the Court, as published in the newspapers, show that the attention of the judges was mainly directed to the general question, whether the act of Congress making treasury notes a legal tender in any case, was valid. The further question, whether it was applicable to contracts expressly payable *in coin*, was scarcely alluded to by any member of the Court, except Mr. Justice Agnew, who delivered a very able opinion, in perfect accordance with the positions we have taken; and Mr. Justice Strong concurred with him.

In *Buchegger vs. Shultz* (*14 Am. Law Reg., 95*), the Supreme Court of Michigan has decided that in an action upon a note given for $800, of which $500 was to be paid in gold, the plaintiff could recover only $800 and interest, although it appeared that gold was at a premium of 50 per cent. in legal tender notes.

The Court say, they "recognize fully the fact *that gold as an article of traffic* has its value regulated by the supply and demand; and when *dealt in as a metal simply*, the laws respecting moneys and legal tenders do not affect the contracts."

The Court holds that the parties *did not contract with reference to gold as a metal simply*, or in other words as an article of commerce. Such a conclusion involves a disregard of the whole *substance* of the contract. When the parties separated $500 from the residue of the contract, and provided that those dollars *should be paid in gold*, they intended that their words should have some meaning. Nor does any doubt rest upon that meaning. It was, that for that portion of the note the maker should pay *in gold* so many ounces, pennyweights, and grains, as are contained in 500 gold dollars of the coinage of the United States mint. They contracted as clearly

for the gold "as a metal simply," as they would have done if they had named the number of ounces of gold which are contained in 500 dollars of gold, and had made no mention of "dollars." Indeed, the slightest acquaintance with the laws of currency will teach us that such is the character of every contract in regard to coin. I quote from the article "Money" in the latest edition of the Encyclopædia Brittanica. "However great the advantages attending the use of coins, their introduction did not in any degree affect the principle of exchanges. Equivalents are given for equivalents. The exchange of a quarter of corn for an ounce of pure unfashioned gold bullion, is undeniably as much a barter as if the corn were exchanged for an ox or a barrel of beer. But supposing the metal to be formed into a coin, that is, impressed with a stamp indicating its weight and fineness, that circumstance would evidently make no change in the terms of the barter. The coinage saves the trouble of weighing and assaying the bullion, *but it does nothing more.* A coin is merely a piece of metal of known weight and purity, and the commodities exchanged for it are always to be of equal value. And yet these obvious considerations have been very generally overlooked. Coins, instead of being viewed in the same light *as bullion*, have been regarded as something quite mysterious." This mystery appears to have affected the Supreme Court of Michigan. The opinion of that Court says, that judgment "can be rendered only for the number of dollars mentioned in the note, and the interest thereon, *since one dollar is legally just as valuable as any other dollar.* The legal damages for a failure to pay $500 *in gold*, cannot possibly exceed $500 in any lawful currency."

Where the Court finds authority for saying that "one dollar is legally just as valuable as any other dollar," we are not able to ascertain. It is certainly not found in the statutes. If we are not mistaken, there are in the coinage of the United States at least three different kinds of dollars (aside from treasury notes, if they can be classed as coinage), all having different legal values.

In the gold coinage of 1833, and of prior date, the dollar is equal in legal as well as actual value to one dollar and ten cents of the gold coinage since the 31st day of July, 1834.

In the silver coinage under the act of February 21, 1853, the dollar is only equal in value to 94 cents of the silver coinage prior to that date.

The Court therefore erred greatly, when it asserted that "one dollar is legally just as valuable as any other dollar." Not to mention copper or paper, there are four different kinds of gold and silver dollars, having as many different legal values, recognized by our laws.

We have already shown, *conclusively*, as we think, that a party may contract with special reference to payment in any one of these different kinds of coinage, and if the contract be not performed, damages will be given, equal to the value of the *specific coin* contracted for, in the cheapest currency in which the judgment can be discharged. If such be the rule, as it must be between coins of different values, it must equally apply, as between coin and anything else which may be made by law a legal tender.

A short time since it was decided by the Superior Court of New York City, that a contract for freight on goods from India, in terms payable in *gold or silver coin*, could be discharged by payment of the nominal amount of freight in legal tender notes. Immediately after the decision, the defendants, Messrs. E. D. Morgan & Co., published a note in the New York papers, saying, in substance, that they defended the action on the ground that the contract was fraudulent in its inception, and not on the ground that they had a right to discharge it (if not fraudulent), in legal tender notes; and saying also, that if it was shown that there was no fraud in the transaction, they should pay the freight in gold, notwithstanding the decision.

A few days later the following notice appeared in the papers.

"We learn that Messrs. E. D. Morgan & Co. have paid in gold the amount of freight on goods from India which, a few

days ago, the Superior Court of this city decided might lawfully be paid in greenbacks, inasmuch as these under the law of February, 1861, are legal tender for all debts whatever."

One would think that courts which persistently adjudge a known and recognized falsehood to be a legal truth, would re-examine their ground, when the immorality of such judgments is so glaring that honorable men in whose favor they are pronounced, are compelled by their sense of justice to repudiate them.

In the case of *Gladstone and others agst. Chamberlain and others*, lately before Ch. J. Nelson, in the U. S. Circuit Court, the same question was presented and decided in accordance with our positions. The learned Ch. J. said, "The question is, whether or not the contract at the Island of Ceylon, in the charter party, to pay for the freight of goods deliverable in New York *in cash*, means a payment in specie—gold or silver. My opinion is, if that is the true interpretation of the agreement, then *the libellants are entitled to specie or its equivalent at New York.*"

The foregoing are the only modern cases which have been brought to our notice, in which the question here considered has been presented.

Questions arising out of the depreciation of the currency by governments, between the date of contracts and the time of their fulfilment, are by no means new; on the contrary they have often been considered, by learned writers and by courts, and we admit the weight of authority to be in favor of the doctrine, (above conceded by us,) that where parties agree to pay or deliver a given number of the money units of a country *generally*, as shillings, pounds, or dollars, both parties take the risk of any change which the sovereignty of the country may make in the value of such money units in the intermediate time. (*Story on Promissory notes, §§ 390 to 394 and notes.*)

Thus, in the present case, if the contract had been to pay

in dollars, generally, without discrimination, the plaintiff would have been justified in tendering in payment the *depreciated* dollars which the government had between the date of the contract and the time of the performance, caused to be issued. So, on the other hand, if the government, in the mean time, had required dollars to consist of platinum instead of gold, of the same number of grains and of twice, or more, its value, abolishing all other legal tenders, the plaintiff would have been bound to pay in platinum dollars, however unjustly and severely the change might been upon him. (*Id.* § *390.*)

However, there are not wanting, as Judge Story shows, able authorities in favor of the position, that even in such cases, where the contract is general, containing no provision guarding against a change in the currency, performance is to be made in currency as it existed by law *at the date of the contract*, and not as it may exist at the time of performance. (*Story on Promissory Notes*, § *393 and Note.*)

No one, however, can read the authorities referred to by Judge Story, without being convinced that all the judges and writers referred to would have concurred in the position that where the contract provided *expressly* for payment in the coinage existing at the date of the contract; the debtor, or party promising, must pay in the coinage promised, according to the terms of agreement, or if allowed to "pay in debased money, being the current coin, he must pay so much more as would make it equal to the sum promised." (*Id.* § *390*, *Note 2.*)

There is no hardship in this, because the debtor by his contract had guarded against being injured by the appreciation of the currency by the government, and should not therefore be allowed to gain by its depreciation.

The lawfulness of such contracts was never disputed and cannot be, and no good reason can be given against their binding force. The general government has been making

such contracts by millions for the last five years. Are such contracts not binding?

There is another class of cases which bear strongly upon the present question, and which furnish a conclusive answer to the position, assumed in all the decisions whose soundness we deny, viz: that "judgment can be rendered only for the *number of dollars mentioned in the contract and interest* thereon; since one dollar is legally just as valuable as any other dollar." (*14 Am. Law, Reg., 97*). We allude to actions on bills drawn here payable in foreign countries, returned protested. In such cases the judgment is never limited to the amount of dollars promised to be paid and interest, but in this state formerly 20 per cent. was added thereto, where the bill was drawn on Europe, (*Hendricks vs. Franklin, 4 John., 119: Graves vs. Dash, 12 id. 17*), which has since been reduced by statute to ten per cent. (*1 R. S., 770, sec. 18, subdiv. 4; 3 Kent's Com., 116, 117*).

Mr. Justice Ingraham was therefore under a wrong impression, when he said, in one of the cases cited against us (*30 How. P. R. 394*), "I do not think a case can be found which sustains any measure of damages for the non-performance of a contract to pay money, other than the interest upon the sum in default;" and the leading case to which the judge refers was expressly overruled in the Court of Errors. (*Graves vs. Dash, 12 John., 17: 3 Kent's Com., 117; Grant vs. Healy, 3 Sum., 523*).

The principle asserted in these cases appears to us to answer all which has been urged in the opinions against us, and to *govern the present case.*

In those cases the defendants promised to pay dollars at a place where they were worth ten per cent. more than the dollars which the judgment, when rendered, would require them to pay; the Court therefore, in order to make their performance come up in substance to their promise, entered judgments against them for *eleven hundred dollars* (or twelve hundred when 20 per cent. was allowed) *for every thousand* specified in the contract.

Our contract is the same in substance, as these. The dollars specifically promised, are worth 100 per cent. more than the dollars in which the Court will pronounce its judgment, or which will discharge the judgment when it is pronounced; the Court therefore, to make the plaintiff's performance come up to his promise in substance, must require him to pay twice as many dollars as he promised, and twice as many as he tendered.

VII.

This is a case, eminently demanding the application of the doctrine of specific performance.

2 Story's Eq. Jur., § *717*, *a.*

If there be any such difficulty as judges seem to apprehend, in the way of estimating damages, in cases like the present, so as to do *justice in fact*, between the parties, then the equitable remedy clearly is, to compel a specific performance.

The remedy in damages is limited to cases, where those "will give a clear and full compensation," (*2 Story's Eq. Jur. supra*); or, as is said in § *718*, "the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy." (*Id.* § *728*, *ad finem*).

Upon the simplest principles of natural justice, and upon the principles of our opponents this plaintiff should be required to *perform his contract*, as the condition of obtaining relief.

As we have before quoted from Fonblanque, "In contracts, respect is first had to the things expressed in the agreement, *if they may possibly be obtained.*"

Here the plaintiff agreed to pay in gold or silver coin. It is not pretended that the coin cannot be obtained, on the contrary, the plaintiff insists that it is no more valuable, and therefore no more difficult to be obtained than paper, and yet he persists in pressing the paper upon us, instead of handing over the coin in accordance with his agreement.

The Court, with its arm of power comes in, and, justifying his refusal to perform his agreement, compels us to take the paper, and allows him to keep the coin.

Now one of two things is true; either the paper and the coin, are, as the plaintiff contends, of equal values, or they are, as we contend of widely different values. If the first position be true, the plaintiff, having promised to pay in coin and not in paper, is wholly without excuse for not performing his agreement, and the Court is without excuse for not compelling him to perform it. If, as we contend, the coin promised is far more valuable than the paper tendered, it is "decreeing iniquity," to establish his tender of payment as performance, or the equivalent of performance.

VIII.

The learned Judge who delivered the opinion of the Court below says: "If the obligation in this case had been such as required *the delivery* of one thousand eight hundred gold dollars, and not as it was *to pay* one thousand eight hundred dollars in gold or silver coin, its construction must necessarily have been different. For it would then be in no sense a debt within the contemplation of the statutes." (*Fols. 82, 83*).

This, with what is said in the following thirteen lines, is all sound, with the single exception of the position that the construction of the contract would have been different, if the word "deliver" had been substituted for the word "pay" in the contract.

Now we say, and we do so without fear of contradiction in this Court, that the *legal effect* of this contract is *exactly the same*, as if it had provided that the plaintiff should "deliver" to the defendant $1,400, instead of providing that he should "pay" to him that sum. Both require *exactly the same act to be done*, and of course have the same meaning. If this be not so, let the plaintiff's counsel show us, *what it is* that the one expression requires the plaintiff to do, which the other does not require him to do. Nothing of the kind can be shown, and the terms are therefore *absolutely synony-*

mous, in the sense in which they are used. The learned Judge therefore, in this concession, which is, we apprehend the soundest part of his argument, has yielded the whole controversy.

The parties have treated the "gold and silver coin," not as currency, but as articles of traffic or commodities merely," as the government now treats them, (as we have shown), and as the whole U. S. commercial world treats them at this time.

The learned Judge distinguishes the cases of the conversion of coin by a carrier, or other person, from those of promises to pay or deliver coin, holding that in the former case "the coin would be treated merely as property, and its *highest market value*" allowed by way of damages, while in the latter case the obligation to pay a specified number of dollars in coin, "could be extinguished by any thing possessing the LEGAL value and character of that quantity of dollars." (*Folios 84, 86.*)

The proposition is wholly unsound. So far as damages are concerned, no greater obligation arises from the legal liability growing out of a conversion of property than that which arises from the breach of a solemn promise to deliver the same property, or the same amount of property of the same character. Indeed no more extensive or stronger liability *can be created in any possible way* than that which is created *by contract* in such cases: nor are the damages any greater to the owner of the property, in being deprived of it by means of a trespass, or theft, or robbery, than by means of a breach of a contract to deliver it; nor is the rule of damages different in any of these cases (aside from the question of punitive damages, which has no bearing here).

If we are not wholly in error, the distinction which the learned Judge has taken has no foundation whatever, and we believe no adjudged case can be found which countenances it. The damages for the wrongful conversion of a thousand dollars in gold; or for the failure of a carrier to deliver according to instructions, a thousand such dollars entrusted to him for transportation; or for a failure of a party *to pay*, or

(which is the same thing), *to deliver* a thousand gold dollars, in pursuance of his contract to make such payment, must necessarily be the same. The *obligation* on the one side, and the *deprivation* on the other, are exactly identical in all the cases.

No judgment will approximate to justice, which does not adopt this conclusion as its basis.

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